No. 1097

Supreme Court of the United States

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, Superintendent of the State Penitentiary, Richmond,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

Opinions Below

The opinion of the Supreme Court of Appeals of Virginia, dismissing the petition for a writ of habeas corpus, is unreported, but is appended to the petition for certiorari.

The opinion of that Court, affirming upon writ of error the judgment of the Circuit Court of Appeals of Virginia, which judgment found petitioner guilty of murder in the first degree and sentenced him to death, is reported in *Waller* v. *Commonwealth,* 178 Va. 294.

Grounds Upon Which the Jurisdiction of This Court is Invoked

It is respectfully submitted that under Title 28, Sec. 344(b), (Judicial Code, Sec. 237 amended) this Court has jurisdiction of this petition for certiorari, such petition being one to review a final judgment and decree of the Supreme Court of Virginia, the highest court of that State in which a decision could be had, which judgment and decree dismissed a petition for habeas corpus in which petitioner especially set up and claimed, under the Constitution of the United States, the right, privilege, and immunity against being deprived by the State of Virginia of his life and liberty without due process of law, and against being denied by that State the equal protection of the laws.

Statement of the Case

A concise statement of the case, containing all that is material to the consideration of the questions presented, with appropriate page references to the certified transcript of record from the Supreme Court of Appeals of Virginia, is contained under the heading "SUMMARY OF MATTERS INVOLVED", pp. 1-9 of the petition for writ of certiorari, in support of which this brief is filed. In the interest of brevity, this Court is respectfully referred to such statement of the case in the petition for certiorari.

Specifications of Assigned Errors Intended to be Urged

Petitioner will urge as assigned errors:

1. That the Supreme Court of Appeals of Virginia erred in failing to hold that the State of Virginia had denied petitioner equal protection of the laws and due process of law within the meaning of the 14th Amend-

ment to the Constitution of the United States, by reason of the systematic exclusion by said State of non-payers of poll taxes from grand and petit juries of Pittsylvania County, Virginia, and by reason of such exclusion from the grand jury indicting petitioner and from the petit jury convicting him.

2. That said Court, therefore, erred in dismissing the petition for habeas corpus, and in refusing to issue said writ of habeas corpus as prayed.

Summary of Argument

I. Numerous opinions of this Court make it clear that the prohibitions of the 14th Amendment against denial by a State of equal protection of the laws are not limited to denials on account of race or color, but extend to denials by reason of economic status, politics, or religion, or other general class discriminations.

II. While the Constitution and laws of the State of Virginia, as construed by the Supreme Court of Appeals of Virginia, in *Waller* v. *Commonwealth, supra,* do not expressly make the payment of poll taxes, nor thereby the right to vote, a qualification *in law* for either grand or petit jurors, such Constitution and laws have been expressly designed to permit them to be administered, and they are administered, so as to make the payment of poll taxes a qualification *in fact* for jury service, and thereby systematically to exclude from jury service non-payers of poll taxes, otherwise eligible for such service.

III. On this record no valid contention can be made that certiorari should not issue because of any formal defects in petitioner's respective motions upon trial before the Circuit Court of Pittsylvania County, Virginia, to quash the indictment and to quash the *venire facias,* or because petitioner offered no evidence in support of those motions.

ARGUMENT

I.

Numerous opinions of this Court make it clear that the prohibitions of the 14th Amendment against denial by any State of equal protection of the laws are not limited to denials on account of race or color, but extend to denials by reason of economic status, politics, or religion, or other general class discriminations.

Reference has already been made in the petition for certiorari, p. 12 *et seq.*, to the fact it may be contended that a denial of equal protection of the laws, to come within the prohibitions of the 14th Amendment, must be a denial because of race or color, and that the basis for any such contention is to be found in certain dicta of this Court in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, and in the *Slaughter-House Cases*, 83 U. S. (16 Wall) 36, 81.

It has there likewise been noted that in both cases this Court expressly refused to hold that denials of equal protection of the laws prohibited by the 14th Amendment are so limited, and that, indeed, in both cases there is dicta to the contrary.

In the *Strauder* case, *supra*, this Court said, page 310:

> "We do not say that, within the limits from which it is not excluded by the Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment

was ever intended to prohibit this. Looking at its history, it is clear that it had no such purpose. *Its aim was against discrimination because of race or color.*"

* * * * *

"*We are not now called upon to affirm or deny that it had other purposes.*"

In so stating, this Court referred to its previous decision in the *Slaughter-House Cases, supra,* where this Court had said, p. 81, with particular reference to the 14th Amendment:

"We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

This Court, however, neglected to quote its immediately succeeding language in the *Slaughter-House Cases,* where it had said, on the same page:

"But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, *or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before* us * * *".

It also is to be noted that this Court, in the *Strauder* case, omitted all reference to the following language which this Court had also used in the *Slaughter-House Cases,* p. 72, and which this Court later quoted in its opinion in *U. S.* v. *Wong Kim Ark,* 169 U. S. 649, 677:

> "*We do not say that no one else but the negro can share in this protection.* Both the language and spirit of these articles are to have their fair and just weight in any question of construction * * * And so if other rights are assailed by the states, which properly and necessarily fall within the protection of these articles, *that protection will apply though the party interested may not be of African descent.*"

Moreover, this Court, in the *Strauder* case, in addition to refusing to hold specifically that the prohibitions of the 14th Amendment against denial of equal protection of the laws are limited to denials on account of race and color, used language in that very decision arguing against such limited construction. At pp. 308-309 of the *Strauder* case, this Court said:

> "The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. *The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.* Blackstone, in his Commentaries, says: 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter'. It is also guarded by statutory enactments intended to make impossible, what Mr. Bentham called 'packing juries'. *It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy*".

Furthermore this Court said, p. 310, of that same opinion:

> "The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and *those are as comprehensive as possible.* Its language is prohibitory; but every prohibition implies the existence of rights and immunities, *prominent among which is the immunity from inequality of legal protection, either for life, liberty or property*".

It is certainly justifiable to conclude, therefore, that even the dicta of this Court in the ***Slaughter-House Cases*** and the *Strauder* case, taken as a whole, do not commit this Court to a construction of the 14th Amendment limiting the prohibitions of the equal protection clause to denials solely because of race and color. On the contrary, it has been seen that, in both decisions, the Court expressly protected itself from any such commitment.

Furthermore, this Court, in numerous opinions, has consistently recognized that the prohibitions of the 14th Amendment against denial by a state of equal protection of the laws cannot be limited to denials solely because of race or color.

In the *Civil Rights Cases,* 109 U. S. 3, this Court said, p. 11:

> "The 1st section of the 14th Amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of

> the laws'. It is state action of a particular character that is prohibited. Individual invasion of the individual rights is not the subject matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs *the* privileges and immunities *of citizens of the United States,* or which injures *them* in life, liberty or property without due process of law, or which denies *to any of them* the equal protection of the laws".

This Court further said, p. 13:

> "It is absurd to affirm that, because the rights of life, liberty and property, *which include all civil rights that men have,* are, by the Amendment, sought to be protected against invasion on the part of the State without due process of law, Congress may, therefore, provide due process of law for their vindication in every case; and that, *because the denial by a State to any persons, of the equal protection of the laws is prohibited by the Amendment,* therefore Congress may establish laws for their equal protection."

Certainly, in the language thus used by this Court in the *Civil Rights Cases,* there is no suggestion that the constitutional protection afforded by the 14th Amendment, either under the due process clause or the equal protection clause, is limited to protection on account of race or color, nor were the provisions of Sections 1 and 2 of the Civil Rights Act of March 1, 1875, there specifically under consideration, themselves so limited, though obviously primarily intended for the protection of negroes.

But it is not necessary to rely on these somewhat general expressions of the opinion of this Court in this respect. This Court has in several instances expressed its direct opinion that the prohibitions of the equal protection clause extend to denials of equal protection of the laws, based not

only on race or color, but on politics, nativity, religion, or other class discriminations "having no possible connection with the duties of citizens".

In *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, p. 92, this Court said, in construing the equal protection clause of the 14th Amendment, in its application to taxation:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. *Of course, if such discrimination were* purely arbitrary, oppressive, or capricious, and *made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other consideration having no possible connection with the duties of citizens* as taxpayers, such exemption would be pure favoritism, *and a denial of the equal protection of the laws to the less favored classes*".*

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* This language of this Court was quoted and applied by the Supreme Court of Texas in holding that the systematic exclusion of Catholics from a jury convicting a Catholic of the illegal sale of liquor was a denial of equal protection of the laws under the 14th Amendment, *Juarez* v. *State*, 277 S. W. (Texas) 1091, 1094.

The decision of this Court in *Ruthenberg* v. *U. S.*, 245 U. S. 480, 481, 482, is in no way inconsistent with the expressions above quoted from its opinion in the *American Sugar Refining* case, *supra*. In the *Ruthenberg* case, so far as appears from the opinion of this Court, there was no contention or evidence of systematic exclusion of Socialists from grand and petit juries in the Northern District of Ohio. The only contention was that the indictment and conviction were unconstitutional because there were no Socialists on either the particular grand jury or the particular petit jury there involved. In denying this contention this Court merely cited its decisions in *Martin* v. *Texas*, 200 U. S. 316, 320, 321, and *Thomas* v. *Texas*, 212 U. S. 278, 282, in which this Court had held that where state laws did not exclude negroes from jury service there must be proof of exclusion in fact.

In *Kentucky* v. *Powers*, 201 U. S. 1, this Court, referring to cases construing the Federal Removal Statute, U. S. Rev. Stat., Sec. 641, said, pp. 32-33:

> "The cases to which we have adverted had reference, it is true, to alleged discrimination against negroes because of their race. *But the rules announced in them equally apply where the accused is of the white race.* Section 641, *as well as the 14th Amendment of the Constitution, is for the benefit of all of every race whose cases are embraced by its provisions, and not alone for the benefit of the African race.*"

Moreover, this Court specifically used this language in referring to the opinion of Judge BARKER, of the Court of Appeals of Kentucky, where, as quoted by this Court, p. 33, Judge BARKER had said:

> "*It is clear that the trial judge was of opinion that it was not an offense against the 14th Amendment or a denial of the equal protection of the laws to the defendant to exclude Republicans* (the accused being a Republican in politics) from the jury, solely because they were Republicans, provided the selected Democrats (the deceased Goebel being a Democrat in politics) were possessed of the statutory qualifications required for jury service".

It is true that this Court held that the Removal Statute did not apply in the *Powers* case even though it was contended that the Court of Appeals of Kentucky, under the laws of that State, could not review the action of the trial court in refusing to quash the indictment and the petit jury panel, though based on such Federal grounds. This Court, however, held that, if such were the case, this Court, on writ of error, could directly review such refusal of the trial court, and could protect the Federal right, which this Court

there implicitly recognizes, against the exclusion of jurors because of the same political party as the accused. This Court said, p. 37:

> "Under this holding, the accused is not deprived of opportunity to have his rights, of whatever nature, which are secured or guaranteed to him by the Constitution or laws of the United States, fully protected by a Federal court. But, it is said that the action of the trial court in refusing to quash the indictment or the panel of petit jurors, *although the motion to quash was based on Federal grounds,* cannot, under the laws of Kentucky, be reviewed by the court of appeals, the highest court of that commonwealth. If such be the law of Kentucky, as declared by the statutes and by the court of appeals of that commonwealth, *then, after the case is disposed of in that court by final judgment,* in respect of the matters of which, under the local law, it may take cognizance, a writ of error can run from this court *to the trial court* as the highest court of Kentucky *in which a decision of the Federal question could be had;* and this court in that event, upon writ of error, reviewing the final judgment of the trial court, can exercise such jurisdiction in the case as may be necessary to vindicate any right, privilege, or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may ex-examine the final judgment of the trial court so far as it involved and denied *the Federal right, privilege, or immunity asserted".*

In this connection, it is interesting to note the decision of the Circuit Court of Appeals for the Sixth Circuit in *Mamaux* v. *United States,* 264 Fed. 816, dealing with the alleged exclusion *of the laboring class* from the grand jury indicting, and from the petit jury convicting the plaintiff

in error in that case. There, the Court of Appeals said, pp. 818-819:

> "As to both the grand and petit juries: For the purposes of this review we shall treat the motion to quash as unequivocally asserting *that members of the wage-earning laboring class were purposely excluded from service on the grand jury which indicted defendant, and from the petit jury which convicted him, and because they were of that class,* notwithstanding the possible ambiguity in the statement that 'members of that class have been purposely excluded from said jury service' etc., as well as the grave and unusual nature of the allegation made and the legal requirement that the defense offered must be pleaded with strict exactness. Agnew v. U. S., 165 U. S. 36, 44. *So treating the allegations, and conceding, for the purposes at least of this opinion, that the purposeful exclusion from either jury of members of the wage-earning laboring class (otherwise legally qualified) merely because they belong to that class, constitutes unlawful discrimination of the same character as if on account of race or color,* and further conceding that the motion to quash was seasonably made, (Carter v. Texas, 177 U. S. 442, 447; Crowley v. United States, 194 U. S. 461, 474) we find, upon the record before us, no error in denying the motion. The mere fact, if it were such, that there were no wage-earners on the jury, would not be enough to entitle plaintiff in error to complain. *It must at least appear that wage-earners were purposely excluded because they were of that class.* Martin v. Texas, 200 U. S. 316, 318; Thomas v. Texas, 212 U. S. 278, 283. As by the law of Ohio persons of the wage-earning class are not excluded from jury service, the question whether there was such purposeful exclusion and discrimination became, on the filing of the motion, one of fact. Martin v. Texas, supra, 200 U. S. at pages 318-320)."

That the prohibitions of the 14th Amendment against denial of equal protection of the laws are not limited to denials because of race or color, but extend as well to denials based on politics, nativity, religion, economic status or any other class discrimination, is moreover, as pointed out in the petition for certiorari, consistent with the latest expressions by this Court as to the scope of those provisions of the 14th Amendment.

In *Smith* v. *Texas*, 311 U. S. 128, this Court said, p. 130:

> "*It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.* For racial discrimination to result in the exclusion from jury service of otherwise qualified groups *not only violates our Constitution* and the laws enacted under it *but is at war with our basic concepts of a democratic society and a representative government.*"

In *Pierre* v. *Louisiana*, 306 U. S. 354, this Court said, p. 358:

> "*Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races* —otherwise qualified to serve as jurors in a community—*are excluded as such from jury service.*"

There have been numerous decisions of state courts involving the question of the exclusion of women from juries. Only two of these decisions appear to have reached this Court. In both, the state courts had sustained the exclusion of women, and in both, this Court denied certiorari, without opinion. *Welosky* v. *Commonwealth*, 284 U. S. 684; *Dreher* v. *State of Louisiana*, 278 U. S. 641.

It would be impracticable within the proper limits of this brief in support of a petition for certiorari to discuss

adequately the decisions of the state courts which this Court refused to review. It must suffice to say that, in any event, the denial of certiorari cannot be taken as an affirmance of those decisions, and that it is more than doubtful whether, were the questions there involved directly presented to this Court, it would reach the same conclusions as did the state courts in those cases.

It is respectfully submitted, therefore, that, so far as this Court has heretofore considered the question at all, its opinions clearly support the view that the prohibitions of the 14th Amendment against denial by any state of equal protection of the laws are not limited to denials based on race or color, but extend to denials, as here, based on economic status.

II.

While the Constitution and laws of the State of Virginia, as construed by the Supreme Court of Appeals of Virginia, in *Waller* v. *Commonwealth, supra,* do not expressly make the payment of poll taxes, nor thereby the right to vote, *a qualification in law* for either grand or petit jurors, such Constitution and laws have been expressly designed to permit them to be administered, and they are administered, so as to make the payment of poll taxes *a qualification in fact* for jury service, and thereby systematically to exclude from jury service non-payers of poll taxes, otherwise eligible for such service.*

The Supreme Court of Appeals of Virginia, in *Waller* v. *Commonwealth, supra,* in affirming on writ of error peti-

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* The text of all provisions of the Constitution and Codes of Virginia, herein referred to but not quoted, will be found in the Appendix at the pages designated herein thus; (App. ....).

tioner's conviction, held that the Constitution and laws of Virginia do not make payment of poll taxes, nor thereby the right to vote, *a qualification in law* for either grand or petit jury service.

Both this Court and the petitioner are, of course, bound by the construction put by the Supreme Court of Appeals on the Constitution and laws of its state. Accepting that construction, petitioner will here undertake to show that such Constitution and laws have nevertheless been expressly designed to permit them to be administered, and they are administered, so as to make payment of poll taxes *a qualification in fact* for both grand and petit jury service in that state, and so as systematically to bar from grand and petit juries all non-payers of poll taxes.

Prior to the adoption of the Constitution of the State of Virginia of 1902 and the Code of 1904, the right to vote was expressly made a qualification for grand and petit juries. Article 3, Section 3, of the Constitution of Virginia, in effect prior to 1902, provided:

> "Sec. 3. All persons *entitled to vote* and hold office *and no others* shall be entitled to sit as jurors." (Mumford's Virginia Code, 1873, p. 71.)

The Virginia Code (1873), p. 1058, Ch. 158, Sec. 1, provided:

> "1. All male citizens 21 years of age, and not over 60, *who are entitled to vote* and hold office under the Constitution and laws of this state, shall be liable to serve as jurors, as hereinafter provided."

The Virginia Code (1887), p. 750, Ch. 152, Sec. 139 contained a similar provision.*

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* Omitted from Appendix in interest of brevity.

Up to the adoption of the Constitution of 1902, neither the Constitution nor the Code of Virginia provided for any poll taxes.

In the Constitutional Convention which adopted the Constitution of 1902, provision for the first time was made for the payment of poll taxes.

That Constitution, by Article II, Sections 18, 19, 20, and 21 (App. iii., iv.) not only provided for the payment of poll taxes, but made their payment an essential qualification for registration and thereby for voting.

The Code of 1904, adopted pursuant to that Constitution, contains similar provisions (Secs. 62, 73, 86b., 86c., 86d., and 86e., App. v-viii.)

Both the Constitution of 1902 and Code of 1904, however, eliminated the specific provisions of the former Constitution and Codes making the right to vote a qualification for either grand or petit jury service.

It has already been shown in the petition for certiorari p. 6, that the Constitutional and Code provisions of Virginia for the payment of poll taxes are in direct conflict with the Act of Congress of January 26, 1870, readmitting the State of Virginia to representation in Congress (App. ii).

It will now be shown that the provisions of the Constitution and Codes of Virginia for the payment of poll taxes, and making such payment a qualification for voting, were not only avowedly adopted for the purpose of disenfranchising negroes, but for the unavowed purpose of barring the vast majority of negroes from grand and petit jury service. It will likewise be shown that the rea-

son the latter purpose was not openly avowed and the reason that the payment of poll taxes, and thereby the right to vote, were not expressly made qualifications for jury service, was, as alleged in the petition for habeas corpus (Tr. pp. 14 and 15), to evade the provisions of the Act of March 1, 1875 (c. 114, sec. 4, 18 Stat. 336, now Title 8, Sec. 44, U. S. C., App. iii.), penalizing exclusion from jury service on account of race or color or previous condition of servitude. The constitutionality of this Act was sustained by this Court in *Ex parte Virginia*, 100 U. S. 313.

At the Constitutional Convention in 1902, Delegate Carter Glass openly avowed the purpose of the Convention to be the disenfranchisement of negroes. He stated:

> "The chief purpose of this Convention is to amend the suffrage clause of the existing Constitution. It does not require much prescience to foretell that the alterations which we shall make will not apply to 'all persons and classes without distinction'. We were sent here to make distinctions." (Proc. Const. Conv. p. 14)
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> "I declared then (referring to the beginning of the convention and the debate on the oath) that no body of Virginia gentlemen could frame a constitution so obnoxious to my sense of right and morality that I would be willing to submit its fate to 146,000 ignorant negro voters (great applause) *whose capacity for self-government we have been challenging for thirty years past.*" (Idem. p. 3257)

Pursuant to this avowed purpose, not only did the Convention enact a poll tax as a condition of the right to vote, but pursuant thereto, as well as to the unavowed purpose of making the payment of a poll tax, and therefore the

right to vote, a qualification for grand and petit jury service, the Convention at the same time deleted Section 20 of the Bill of Rights of the then existing Constitution of Virginia. That section provided:

> "20. That all citizens of the state are hereby declared to possess equal civil and political rights and public privileges." (Mumford's Code of Virginia, 1873, p. 70)

In order, however, to evade the penal provisions of the Act of March 1, 1875, *supra,* the Convention also eliminated the provisions of the former Constitution, making the right to vote an express qualification for grand and petit jury service, and such provisions were likewise eliminated from the Code of 1904.

To achieve, nevertheless, the same practical result as would have followed the retention of the express language of the prior Constitution and Codes making the right to vote a qualification for grand and petit jury service, and at the same time to evade the penalties of the Federal statute, the Constitution of 1902 and the Code of 1904 adopted three patent devices. These have been retained in that Constitution, as now amended, and in the existing Code. These devices are:

First: Instead of expressly providing, as had the previous Constitution and Codes, already quoted, that

> "All persons entitled to vote * * * and no others shall be entitled to sit as jurors."

the new Constitution and Code, in providing the qualifications of jurors, in addition to certain specific qualifications as to age and residence, substituted for the former specific words "entitled to vote", broad and vague terms such as,

"competent in other respects"[1], "qualified in all respects"[2], "suitable in all respects"[3], "well qualified to serve as jurors"[4], or "in other respects a qualified person"[5].

Second: The new Constitution and Code, by failing to define the meaning of these broad and vague terms, thereby vested in the judges of the designated courts unlimited discretion as to their interpretation and application in the qualification, or more precisely, in the disqualification, of persons for grand and petit jury service. (See Code 1904, Secs. 3139, 3142, 3143, 3144, 3976, 3977, 4018; App. viii-xi.) The present Code continues to confer this unlimited discretion on judges in the selection of grand jurors, but transfers to jury commissioners the same unlimited discretion in the selection of petit jurors. (See Code 1936, Secs. 4852, 4853, 4895, 5984, 5988, 5989, 5990; App. xiii-xvi.)

Third: Most significant, however, is the fact that Section 86 (b), of the Code of 1904, (App. v.) and Section 109 of the present Code (1936), (App. xi.) requires the Treasurer to file such poll tax lists in the custody of the clerks of the circuit courts of the several counties. That section provides:

> "That the treasurer of each county shall (at stated intervals) * * * file with the clerk of the circuit court

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[1] Sec. 3139 Pollards Virginia Code 1904. (App. viii.)
Sec. 5984 Virginia Code 1936. (App. xv.)

[2] Sec. 4018 Pollards Virginia Code 1904. (App. x.)
Sec. 4895 Virginia Code 1936. (App. xiv.)

[3] Sec. 3976 Pollards Virginia Code 1904. (App. ix.)
Sec. 4852 Virginia Code 1936. (App. xiii.)

[4] Sec. 3142 Pollards Virginia Code 1904. (App. viii.)
Sec. 5988 Virginia Code 1936. (App. xv.)

[5] Sec. 3977 Pollards Virginia Code 1904. (App. x.)
Sec. 4853 Virginia Code 1936. (App. xiv.)

> of his county, or the corporation counsel of his city, a list of all persons who have paid the poll taxes required by the constitution of this state during three years next preceding that in which such election is to be held, *which list shall state the white and colored persons separately,* * * *." (Italics supplied)

It may be urged, however,

First: That the use of general terms such as "competent in other respects", "qualified in all respects", etc. is not uncommon in the statutes of various states.

Second: That at least one purpose for requiring the Treasurer to deposit the poll tax lists in the custody of the clerks of the circuit courts is to make them available for correction in the judicial proceedings provided for by Section 110 of the Virginia Code of 1936 (App. xii.)

As to the second contention, it would seem obvious that if necessity for judicial correction should arise, there would be no difficulty whatever in requiring the treasurer to furnish such lists direct to the court. For all purposes, the custody of the treasurer would seem to be the most appropriate and convenient, whether the lists be considered as relating purely to revenue taxes, or as lists to be furnished to the judges of election as provided in Section 111 (App. xii.)

As to both arguments, however, it can only be said that the best evidence of the purpose of these statutory provisions is the practical application which has been made of them, and that practical application is not open to question on this record.

The allegations of the petition for habeas corpus as to the manner in which these provisions of the laws of Virginia have been administered are supported by an affidavit

based on an examination of the records of the clerk of the Circuit Court of Pittsylvania County.

The petition and the supporting affidavit show:

As to petit juries:

That all persons on the petit jury before whom defendant was tried and all persons on the *venire facias* from which said petit jury was drawn, and all persons on the jury list from which said *venire facias* was summoned, were persons appearing on the poll tax list of Pittsylvania County and no others (Tr. 7, 8, 22, 23). That such poll tax lists are the exclusive source from which the jury commissioners habitually draw the names appearing on the jury list (Tr. 8, 23), and that the jury lists of Pittsylvania County are habitually so compiled, and thereby nonpayers of poll taxes are regularly and systematically excluded from juries in that county (Tr. 8, 23). Furthermore, that in Pittsylvania County, with a population for the year 1940 of approximately 30,000 persons over 20 years of age, only approximately 6,000 were able to pay, and did pay, poll taxes and were thereby eligible in law to vote, and in fact to serve as grand and petit jurors (Tr. 16, 23). That while negroes and share-croppers are not as such barred as grand and petit jurors, they, because of their similar economic status, constitute a large proportion of the economic class so barred, and that petitioner himself is of such economic class (Tr. 15).

As to the grand jury:

That of the seven persons serving on the special grand jury by which petitioner was indicted, all had paid poll taxes, and all except one had paid such poll taxes for the years 1939 through 1940. Such one, though apparently in default for those years, had paid poll taxes for the year 1937 (Tr. 7, 22).

That as to both juries:

That for the purpose of obtaining like information as to jury lists of Pittsylvania County for the year 1939, counsel for petitioner attempted to examine the lists for that year, which petitioner is informed and believes are in the custody of the clerk of the Circuit Court of Pittsylvania County; that the clerk of the court, however, refused counsel access to such lists, stating that he so refused by direction of the judge of said Circuit Court, being the same judge before whom petitioner was convicted (Tr. 8).

In the light of these sworn allegations of the petition for habeas corpus, the truth of which the State of Virginia has had ample opportunity to challenge, but which it has not challenged, there can be no reasonable doubt that the Constitution and laws of Virginia which are so administered, are intended to be so administered, and intended to make the payment of poll taxes *a qualification in fact*, though not in law, for both grand and petit jury service. Under these circumstances, it is respectfully submitted that petitioner's case comes substantially within the principles underlying the decision of this Court in *Rogers* v. *Alabama*, 192 U. S. 229.

III.

On this record no valid contention can be made that certiorari should not issue because of any formal defects in petitioner's respective motions upon trial before the Circuit Court of Pittsylvania County, Virginia, to quash the indictment and to quash the *venire facias*, or because petitioner offered no evidence in support of those motions.

It may be contended that petitioner's separate motions upon trial to quash his indictment and to quash the *venire facias* were insufficient in merely alleging that the members of the special Grand Jury indicting him, and of the *venire fascias* from which was drawn the petit jury trying him, were

> "* * * selected from poll tax payers of Pittsylvania County",*

since it may be claimed that such motions thereby merely alleged *inclusion* of poll tax payers and not *exclusion* of non-poll tax payers.

It should suffice to say that in the opinion of the Supreme Court of Appeals of Virginia, upon writ of error, that Court specifically construed the motion to quash the indictment as based on the *exclusion* of non-poll tax payers. In that opinion, *Waller* v. *Commonwealth, supra,* the Court said:

> "Upon the calling of the case for trial, counsel for accused filed a motion to quash the indictment, on the

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* It should be noted that in the motions actually made the word "exclusively" preceded the word "selected", but that in the bills of exceptions as signed by the trial court the word "exclusively" was omitted. (Tr. pp. 18-19, Exhibit 1, p. 59 and pp. 31, 32).

ground that the indictment was returned by a grand jury *from which non-poll tax payers had been excluded.*"

It will also be noted that while in the succeeding paragraph of that Court's opinion it quoted petitioner's motion to quash the *venire facias* in the terms in which it had literally been made, which were identical with the literal terms of the motion to quash the indictment, that Court made no distinction in this respect in the construction of the two motions, plainly treating both motions as based on the *exclusion* of non-poll tax payers.

It, moreover, should be noted that no other construction of those motions could fairly be made in view of the interpretation put on them by the trial court and by petitioner's counsel at the time they were made. Reference in this respect is made to page 60 of Exhibit 1 attached to the petition for habeas corpus to the Supreme Court of Appeals of Virginia (Tr. 18-19). There it appears Mr. Stone, counsel for petitioner, stated:

"Mr. Stone: As Your Honor knows, there is no requirement that the accused have persons of the same economic or social category on either the grand or petit jury, but there is, in our opinion, a requirement that there be *no exclusion* of persons of the same general social status, and that is our contention.

The Court: Mr. Stone, what is the basis of your motion in this case? What has the qualification or otherwise to do with this defendant?

Mr. Stone: Persons who are unable to pay their poll tax are *excluded* and the accused is in the same general social and economic category.

The Court: I selected the (special grand) jury myself. I don't know whether they are qualified or not; I am always glad to see a person pay his poll tax. I think people ought to qualify and take an interest in

their government, but I don't know whether they are qualified. Motion overruled.

Mr. Stone: May I note an exception?

The Court: Any other motions?

Mr. Stone: That's all. Your Honor overruled the motion also to quash the petit jury?

The Court: What was that?

Mr. Stone: Our motion to quash the *venire facias* for *the same reason.*

The Court: Yes, I overruled that, certainly.

Mr. Stone: We also except to that, your Honor.

It may be contended, however, that the admitted failure of petitioner to offer any evidence of such exclusion in support of his respective motions to quash his indictment and the *venire facias* is a bar to the issuance by this Court of certiorari to review the judgment of the Supreme Court of Appeals of Virginia, dismissing the petition for a writ of habeas corpus. Such a contention could only be based on fundamental misconstruction, as applied to this record, of those decisions of this Court which hold that before application may be made to a federal court for a writ of habeas corpus, state remedies must have been exhausted and state procedure must have been shown inadequate.

Without conceding the validity of those decisions, it will suffice to say here that they have no application to this record. As noted at page 2 of the petition for certiorari, the Supreme Court of Appeals of Virginia dismissed the petition for habeas corpus without requiring any return or answer by the respondent, its opinion merely stating that:

> "* * * the Court having maturely considered said petition and exhibits therewith, is of opinion that said writ of habeas corpus should not issue as prayed. It

> is therefore considered that said petition be dismissed."

In other words, that Court, with full opportunity to do so, did not purport to dismiss the petition for habeas corpus because of petitioner's failure to offer evidence of the fact of exclusion of non-poll tax payers in support of his respective motions, although the petition for habeas corpus itself expressly alleged (Tr. pp. 3 and 4) that petitioner offered no evidence in support of either motion.

This is the more significant because, upon petitioner's preceding writ of error to the Supreme Court of Appeals, that Court, upon the express ground that no evidence had been offered in support of such motions, as well as on the ground that non-payers of poll taxes were not in law excluded from either grand or petit jury service, affirmed the Circuit Court of Pittsylvania County in overruling those motions, *Waller* v. *Commonwealth, supra.*

Moreover, it is obvious that this was no mere inadvertence, but was the result of the recognition by the Supreme Court of Appeals that the grounds upon which it had dismissed petitioner's preceding writ or error could not warrant the dismissal of the petition for habeas corpus. Upon writ of error that court obviously was limited to the record made below. Upon habeas corpus, on the other hand, that court not only could, but was required by the repeated decisions of this Court where a federal right is involved, to go behind the record below. In *Johnson* v. *Zerbst*, 304 U. S. 465, the Court said:

> "True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error'. These principles, however, must be construed and applied so as to

> preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. *In such a proceeding 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioned court has 'power to inquire with regard to the jurisdiction of the inferior court,* either in respect to the subject matter or to the person, *even if such inquiry involves an examination of facts outside of but not inconsistent with the record.'* ''

Moreover, in *Mooney* v. *Holohan,* 294 U. S. 103, this Court said (p. 113):

> "Upon the state courts, equally with the courts of the Union, rests the obligation to regard and enforce every right furnished by the Constitution."

The soundness is obvious of the reasoning behind the holding of this Court in *Johnson* v. *Zerbst, supra,* and in other cases, that on habeas corpus a court must go behind the record in the lower court, if necessary to determine "the very truth and substance". To hold that a court to which application for habeas corpus is made is confined to the record of the court below, and compelled to refuse competent proof upon habeas corpus of facts showing a deprivation of constitutional rights, would defeat the very purpose of that writ.

Furthermore, it is to be noted that all the decisions involving alleged exclusion of negroes from grand and petit juries, in which this Court refused to pass upon the effect of such exclusion because of failure to prove or to offer proof of exclusion in the court below, were cases coming before this Court on *writ of error* and not on habeas corpus. *Smith* v. *Mississippi,* 161 U. S. 592; *Carter* v. *Texas,* 177 U. S. 442; *Tarrance* v. *Florida,* 188 U. S. 519;

Brownfield v. *South Carolina,* 189 U. S. 426; *Martin* v. *Texas,* 200 U. S. 316; *Franklin* v. *South Carolina,* 218 U. S. 161.

In such cases coming before this Court on writ of error this Court, like the Supreme Court of Appeals of Virginia, upon petitioner's writ of error, was limited to the record in the court below. Clearly, as has been shown, no such limitation applied to the Supreme Court of Virginia upon the petition to it for habeas corpus, and it is obvious no such limitation can apply to this Court upon certiorari to review the judgment dismissing that petition.

The petition to this Court for certiorari is a petition to review the judgment of the Supreme Court of Appeals dismissing the petition for habeas corpus, and is not a petition for certiorari to review the judgment of that Court in dismissing petitioner's preceding writ of error. Petitioner concedes that were this a petition for certiorari to review the dismissal of his writ of error, this Court would, of course, be limited to the record before the Supreme Court of Appeals upon such writ of error, on which record appeared no proof that non-payers of poll taxes were in fact excluded by the State of Virginia from grand and petit juries in Pittsylvania County.

The record before the Supreme Court of Appeals upon the petition for the habeas corpus, on the contrary, contains not only offer of proof, showing the systematic exclusion of non-payers of poll taxes from both grand and petit juries of Pittsylvania County, but such offer is supported by affidavits showing detailed evidence of such exclusion, obtained by an examination of the records of the Circuit Court of that County (Tr. pp. 7, 8, 22, 23). It is this record on habeas corpus which this Court is asked to review upon certiorari, and it is most respectfully submitted that, for the purpose of this petition for that writ, the facts alleged

in the petition for habeas corpus must be assumed to be true, since the petition for habeas corpus was dismissed by the Supreme Court of Appeals without requiring return or answer by respondent, and without opinion other than that the petition was insufficient on its face to warrant the writ. Cf. *Whitten* v. *Tomlinson,* 160 U. S. 231.

Indeed, it is submitted that here the reasons for the assumption of the truth of the facts alleged in a sworn petition for habeas corpus, dismissed without return or answer, are far stronger than in the ordinary case. Here, the facts alleged, showing systematic exclusion of non-payers of poll taxes from both grand and petit juries, were, as shown by the affidavits attached to the petition, obtained from an examination of the records of the Circuit Court of Pittsylvania County. If the Supreme Court of Appeals had reason to believe that such allegations of the petition for habeas corpus were not true, or even had reason to doubt their truth, that Court could readily have determined their truth by requiring a return or answer of that petition. Otherwise, as noted at page 4 of the petition for certiorari, it would be necessary to assume that that Court not only permitted, but compelled, the presentation of grave constitutional questions to this Court, upon a case which it had reason to believe might prove moot. Moreover, as there noted, the very nature of the facts alleged was such as to put a particular responsibility on the Supreme Court of Appeals in this respect, since those facts related to the administration of justice in its subordinate courts, a subject peculiarly within its concern and knowledge. Since that Court required no such return or answer, the only reasonable construction of its judgment, dismissing the petition for the writ, is that that Court recognized that the State of Virginia does in fact systematically exclude non-payers of poll taxes from grand and petit jury service in Pittsylvania County, but held,

nevertheless, that such exclusion does not constitute a denial either of equal protection of the laws or due process of law within the meaning of the 14th Amendment. It is this construction by the Supreme Court of Appeals of petitioner's constitutional rights, based on facts, which, for the purpose of this petition for certiorari, there is every reason to assume are true, that this Court is asked to review.

Finally, it is frankly incredible that either the State of Virginia would contend, or that this Court would sustain a contention, that the truth of the facts alleged in the petition cannot be established on habeas corpus, because the evidence of those facts was not offered in support of petitioner's motions to quash the indictment and the *venire facias*. Counsel do not believe that such a contention would be made, or, if made, be sustained, were its necessary implications understood.

Such a contention would mean that the petitioner must be electrocuted, in violation of his constitutional rights, because of the assumed mistake of his trial counsel as to the procedure necessary to establish such violation. Were such mistake clear, the proposition would be no less atrocious, but it is far from clear that, on this record, it should be held there was any mistake, procedural or otherwise, in this respect.

While it is undoubtedly the general rule that evidence of the facts must be offered in support of a motion to quash an indictment or a *venire facias*, based on the alleged systematic exclusion of an accused's racial, economic, religious or political class, the validity of such a rule, as applied to petitioner's case even in the trial court, may well be questioned. Where, as here, it must be assumed that the State itself deliberately, knowingly and systematically excluded all members of petitioner's eco-

nomic class from grand and petit juries of the county in which petitioner was indicted and tried, the State itself is clearly chargeable with knowledge of such exclusion. Therefore, it would not be unreasonable to hold that a challenge asserting such exclusion should place upon the State the burden of disproving the charge, since the facts are peculiarly and readily within its knowledge and, therefore, the charge, if unfounded, may be readily disproved.

However this may be, it would be Alice in Wonderland logic to contend that, upon this petition for certiorari to review the denial of habeas corpus, the petitioner, because he did not prove in the trial court facts, which under the sworn allegations of the petition for habeas corpus it must be assumed the State already knew, petitioner may not prove such facts to this Court, although the State, with full opportunity to do so, has not even challenged them. Indeed, under reasonable principles of procedure, it might well be held that the State should now be barred from any future challenge of such facts. As has been noted already, those facts were of a nature peculiarly within the concern and knowledge of the Supreme Court of Appeals. Had that Court any reasonable doubt of the truth of such facts presented to it under sworn allegations, it was not only it's right but it's duty to require proof of them *before* permitting the grave constitutional questions arising on them to come before this Court. To permit subsequent challenge of them would be to encourage the burdening of this Court with the possibly unnecessary consideration and determination of constitutional questions, and to impose on all parties unnecessarily circuitous procedure.

Waiving aside, however, all such considerations of reasonable and proper procedure, and assuming that petitioner's trial counsel did make a mistake as to the procedure required to establish the facts of exclusion, the truth

of which is not open to question on this record, is the penalty for such a mistake to be petitioner's electrocution, even though the violation of petitioner's constitutional rights is otherwise clear? It is respectfully submitted that the legalistic detachment inherent in contentions of this nature would seldom be possible if those advancing them were compelled to assume the physical task, as well as the moral responsibility, of executing the victims of their legalism. In any event, it is respectfully submitted, there can be no warrant on this record for any such legalistic disregard of petitioner's constitutional rights.

CONCLUSION.

In conclusion, it is respectfully submitted that the Supreme Court of Appeals of Virginia, in dismissing the petition to that Court, for habeas corpus has plainly decided federal questions of wide public interest, not heretofore determined by this Court and, it would appear, has decided them in a way not in accord with the applicable decisions of this Court. It is further respectfully submitted that, unless this Court shall issue its writ of certiorari as prayed, and shall thereupon require the issuance of a writ of habeas corpus to petitioner and his discharge upon such writ, petitioner will be deprived of his life in contravention of his rights under the 14th Amendment to the Constitution of the United States.

Respectfully submitted,

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